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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B293935
(Super. Ct. No. VA103436)
(Los Angeles County)

In 2009, a jury convicted Ricardo Hernandez of forcible rape (Pen. Code,¹ § 261, subd. (a)(2)) and 11 counts of lewd acts upon a minor, his stepdaughter (§ 288, subd. (c)(1)). The trial court sentenced Hernandez to state prison and ordered him to pay victim restitution to five people: his stepdaughter, his wife, and his three other minor children. (§ 1202.4, subd. (f).)

Hernandez contends the trial court erred by ordering him to pay victim restitution to his other three minor children.

¹ Further unspecified statutory references are to the Penal Code.

Because Hernandez appeals from a nonappealable order, we dismiss this appeal.

PROCEDURAL HISTORY

In 2009, after Hernandez was convicted of multiple felonies, the trial court held a restitution hearing. The court considered billing records for medical expenses for each of five claimants. The People requested \$7,700 in restitution, plus interest. Hernandez objected on the grounds that restitution could not be awarded to his three other minor children, who were not the targeted victims of his crime. The court overruled the objection, finding that “victims include family members.” It ordered Hernandez to pay the requested victim restitution.

In 2010, Hernandez appealed the judgment of conviction on other grounds, and we affirmed. (*People v. Hernandez* (Mar. 8, 2010, B214573) [nonpub. opn.].) In 2015, he moved to modify the 2009 restitution order on the ground that there was no evidence of his ability to pay the “restitution fine.” The court denied the motion. In October 2018, Hernandez filed a motion to correct clerical error, and strike the restitution order. He argued that the court should strike the order because there was “[n]o hearing . . . and no evidence was presented to show any purported economic losses.” The court denied the motion.

DISCUSSION

Hernandez’s notice of appeal specifies he is appealing from the October 2018 order denying his “Motion to [C]orrect Clerical Error and Strike Direct Order.” But that order is not appealable.

“‘[G]enerally a trial court lacks jurisdiction to resentence a criminal defendant after execution of sentence has begun. [Citation.]’ [Citations.] There are few exceptions to the

rule. [¶] Section 1170, subdivision (d), provides, in relevant part, that a trial court may recall the sentence on its own motion within 120 days after committing a defendant to prison.

[Citations.] . . . [¶] A trial court may correct a clerical error, but not a judicial error, at any time.” (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1204-1205 (*Turrin*).) And, “an unauthorized sentence may be corrected at any time.” (*Id.* at p. 1205.)

None of these exceptions apply here. In his motion, Hernandez sought to strike the restitution order on the grounds that he did not receive a hearing and there was no evidence of economic losses. But the trial court held a restitution hearing and the People presented billing records as evidence. Because Hernandez does not show any of the exceptions apply, the trial court was without jurisdiction to strike the restitution order. (*People v. Littlefield* (2018) 24 Cal.App.5th 1086, 1092 (*Littlefield*); *Turrin, supra*, 176 Cal.App.4th at pp. 1204-1205.)

Hernandez contends the order is appealable under sections 1202.42, 1202.46, and 1214. However, none of those sections apply. Section 1202.42 pertains to the court’s ability to order income deduction to enforce the restitution order. The record does not contain an income deduction order. Section 1202.46 provides that upon the “victim, the district attorney, or a court[’s]” motion, the court may retain jurisdiction to modify or impose a restitution order until “the losses may be determined.” There is “no need to continue jurisdiction under section 1202.46” because the losses have already been determined. (*Littlefield, supra*, 24 Cal.App.5th at p. 1090.) Moreover, the statute does not authorize a defendant to move the court to modify or “eliminate an unsatisfied criminal restitution obligation.” (*Ibid.*) Section 1214 affords the victim the opportunity to enforce a restitution

order as if it were “a civil judgment.” “The statute merely enumerates tools available to a victim to enforce a criminal restitution obligation. The statute does not provide as a basis for [Hernandez] to eschew that obligation.” (*Littlefield*, at p. 1091.)

Hernandez also argues that because 10 years have lapsed and there has been “no attempt at collecting the restitution award,” the order is appealable under the doctrine of laches. Laches is an “an equitable defense to the enforcement of a stale claim and requires a showing of unreasonable delay plus either the plaintiff’s acquiescence in the act complained of or prejudice to the defendant resulting from the delay.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1087-1088.) “The doctrine of laches may be asserted only in a suit in equity.” (*Id.* at p. 1088.) The doctrine of laches does not apply here because Hernandez is not challenging the state’s ability to collect the restitution order. He is challenging the order on the grounds that the court abused its discretion when it awarded restitution to his other three children—a legal challenge to the order. (*People v. Harvest* (2000) 84 Cal.App.4th 641, 652 [noting that a resentencing hearing where the trial court decided whether to impose victim restitution was not a “suit in equity”].)

“An appeal may be taken by the defendant . . . [¶] . . . [¶] (b) From any order made after judgment, affecting the substantial rights of the party.” (§ 1237.) “Because the trial court lacked jurisdiction to [strike Hernandez’s] victim restitution order, the order denying [Hernandez]’s motion . . . did not affect [his] substantial rights and was thus nonappealable.” (*Littlefield, supra*, 24 Cal.App.5th at p. 1092.) We do not have jurisdiction to consider nonappealable orders.

In any event, Hernandez forfeited his claim because he did not raise it in his first appeal. Generally, “where a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay.” (*People v. Senior* (1995) 33 Cal.App.4th 531, 538.) This rule applies in instances where: “(1) the issue was ripe for decision by the appellate court at the time of the previous appeal; (2) there has been no significant change in the underlying facts or applicable law; and (3) the defendant has offered no reasonable justification for the delay.” (*Ibid.*) At the 2009 restitution hearing, Hernandez objected to the restitution order and raised the same issues he now raises. He could have challenged the restitution order at his first appeal, but did not do so. He has not shown there has been any significant change in the facts or law and has not provided a justification for his delay. Therefore, even if the order was appealable, the claim of error would be forfeited.

In light of our conclusions, we decline to exercise our discretion to treat this appeal as a petition for writ of mandate and express no opinion on the arguments raised in the opening brief.

DISPOSITION

The appeal is dismissed.

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TANGEMAN, J.

We concur:

YEGAN, Acting P. J.

PERREN, J.

Thomas I. McKnew, Jr., and Yvonne T. Sanchez, Judges

Superior Court County of Los Angeles

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